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10/11/06

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Date

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**APPLICANT:** Vincent Kozyrski

**GROUP:** 3721

**SERIAL NO:** 10/734,837

**EXAMINER:** G. Weeks

**FILED:** December 12, 2003

**FOR:** FRAMING MATERIAL HANGERS

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

**AMENDED APPEAL BRIEF**

This amended appeal brief is filed in response to the Notification of Non-Complaint Appeal Brief of October 5, 2006. The withdrawn claims are now not listed in the claims appendix section.

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I. REAL PARTY OF INTEREST

The real party of interest is The Fletcher-Terry Company of Farmington, Connecticut, U.S.A., currently the assignee of record for the present application.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

Claims 1-39 are pending. Claims 1-25 and 32-36 are withdrawn from consideration. Claims 26-31 and 37-39 are rejected, and are appealed herein.

IV. STATUS OF AMENDMENTS

No amendments have been filed subsequent to the final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 26 recites a stack of hangers for framing material.<sup>1</sup> The stack 161 of hangers includes a plurality of hangers 22. Each hanger has a web 148 extending between a pair of legs 150<sup>2</sup>, which legs extend outwardly from the web in a direction substantially perpendicular to the web. A barbed member 154 extends out from each leg.<sup>3</sup> One or more shearable tabs 160 extend between, and attach, adjacent ones of the plurality of hangers.<sup>4</sup>

Claim 27, which depends from claim 26, further recites that each leg has a shoulder surface 158 spaced apart from the web, and that the barbed member extends out from each respective leg adjacent the shoulder surface.<sup>5</sup>

Claim 28, which depends from claim 27, further recites a stack of hangers wherein an opening is disposed between adjacent hangers within the stack.<sup>6</sup>

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<sup>1</sup> In general, see paragraphs 0037, 0038, 0045, 0046 and FIGS. 6-10.

<sup>2</sup> Paragraph 0037, lines 2-4; paragraph 0046, lines 3-7 and FIGS. 6-10.

<sup>3</sup> Paragraph 0037, lines 6-11; paragraph 0046, lines 3-7 and FIGS. 6-10.

<sup>4</sup> Paragraph 0037, lines 3-10; paragraph 0045, lines 6-9 and FIGS. 6-10.

<sup>5</sup> Paragraph 0037, lines 9-12; paragraph 0045, lines 3-9; FIG. 8

<sup>6</sup> Paragraph 0047, lines 9-12; FIG. 10.

Claim 29, which depends from claim 26, recites a stack of hangers, wherein the tabs 160 extending between adjacent hangers within the stack, each have a feature 162,164 that facilitates shearing of the tab.<sup>7</sup>

Claim 30, which depends from claim 26, recites a stack of hangers wherein the hangers 22 are oriented within the stack 161 such that legs of the hangers within the stack are substantially aligned along a single line.<sup>8</sup>

Claim 31, which depends from claim 26, recites a stack of hangers wherein the hangers are oriented such that the webs of adjacent hangers within the stack are substantially parallel and spaced apart from each other.<sup>9</sup>

Independent claim 37 recites a stack of hangers for framing material.<sup>10</sup> The stack 161 of hangers includes a plurality of hangers 22. Each hanger has a web 148 extending between a pair of legs 150<sup>11</sup>, which legs extend outwardly from the web in a direction substantially perpendicular to the web. A barbed member 154 extends out from each leg.<sup>12</sup> One or more shearable tabs 160 extend between, and attach, adjacent ones of the plurality of hangers.<sup>13</sup> The shearable tabs are coplanar with the web.<sup>14</sup>

Claim 38, which depends from claim 37, further recites that each leg 150 has a shoulder surface 158 spaced apart from the web 148, and the barbed member 154 extends out from each respective leg adjacent the shoulder surface.<sup>15</sup>

Claim 39, which depends from claim 37, recites a stack of hangers wherein the tabs 160 extending between adjacent hangers within the stack 161, each have a feature 162,164 that facilitates shearing of the tab.<sup>16</sup>

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<sup>7</sup> Paragraph 0038, lines 6-10; FIGS. 6-10.

<sup>8</sup> Paragraph 0038, lines 13-20; FIGS. 9 and 10.

<sup>9</sup> Paragraph 0038, lines 13-20; FIGS. 9 and 10.

<sup>10</sup> In general, see paragraphs 0037, 0038, 0045, 0046 and FIGS. 6-10.

<sup>11</sup> Paragraph 0037, lines 2-4; paragraph 0046, lines 3-7 and FIGS. 6-10.

<sup>12</sup> Paragraph 0037, lines 6-11; paragraph 0046, lines 3-7 and FIGS. 6-10.

<sup>13</sup> Paragraph 0037, lines 3-10; paragraph 0045, lines 6-9 and FIGS. 6-10.

<sup>14</sup> Paragraph 0038, lines 3-17; FIGS. 6-10.

<sup>15</sup> Paragraph 0037, lines 9-12; paragraph 0045, lines 3-9; FIG. 8

<sup>16</sup> Paragraph 0038, lines 6-10; FIGS. 6-10.

VI. GROUNDINGS OF REJECTION TO BE REVIEWED ON APPEAL

a.) Whether claims 26-31 and 37-39 are anticipated by U.S. Patent 4,339,983 to Okamura (hereinafter "the '983 Patent").

b) Whether claim 26-31 and 37-39 are obvious over U.S. Patent No. 4,728,237 to Lorincz (hereinafter "the '237 Patent") in view of the '983 Patent.

VII. ARGUMENT

Claims 26-31 and 37-39 Are Not Anticipated By The '983 Patent:

The '983 Patent: The '983 patent discloses a clamping device for plate-like members such as corrugated boards; e.g., box cover flaps (Col. 3, lines 28-29). The clamping device includes a base portion 9 and a pair of pivotal pieces 10a and 10b connected to the base portion 9 by thin hinge portions 11a and 11b. Curved claws 15a and 15b extend out from the pivot pieces 10a and 10b. The clamping device is "formed by one-piece molding, for example, of *flexible synthetic resin material* such as polypropylene" (Col. 3, lines 31-32; emphasis added). The one-piece molded clamping device must be comprised of a flexible material to enable the pivot pieces 10a, 10b to pivot relative to the base 9 during clamping and unclamping. The flexible material of the device is further illustrated by the disclosure that: "if the plate-like members are composed of material other than corrugated boards, into which the piercing pieces 15a and 15b cannot be readily caused to penetrate, such plate-like members should preferably be formed with suitable openings which permit reception of the piercing pieces 15a and 15b." (Col. 4, lines 35-41) In other words, the clamping device disclosed by the '938 Patent lacks sufficient material strength to penetrate a material other than corrugated board. In one embodiment, a plurality of the clamping devices are connected to one another by "wire-like connecting members 23 suitably *fixed to the under surfaces of the base portions 9* of the clamping devices CC." (Col. 6, lines 9-15; emphasis added)

The “Clamping Device” of the ‘983 Patent is not a “Hanger”:

To characterize a plurality of clamping devices as the claimed stack of hangers, the Examiner indicates that the ‘983 Patent discloses a stack of hangers, each “hanger” having a shoulder “U”, a web 9, a pair of legs 10a, 10b, barbed members 15a, 15b, with the “hangers” connected by shearable tabs 23. In response to applicant’s remarks that the ‘983 Patent discloses clamping devices, not hangers, the Examiner stated “a recitation of the intended use of the claimed invention must result in a structural difference between the claimed device and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim”.

The language of the claim defines the scope of the invention. *Yale Lock Mfg. Co. v. Greenleaf*, 117 US 554, 559, (1886). A claim preamble has the import that the claim as a whole suggests for it. *In re Paulsen*, 30 F.3d 1475, 1479 (Fed. Cir. 1994) If the claim preamble is necessary to give life, meaning, and vitality to the claim, then the claim preamble should be construed as if in the balance of the claim. *Kropa v. Robie*, 187 F.2d 150, 152 (CCPA 1951); *Pitney Bowes, Inc. v. Hewlett-Packard Company*, 182 F3d 1298 (Fed. Cir. 1999)

In the present case, claim 26 does not recite a broader “An apparatus, comprising” or “A device, comprising”. Rather, claim 26 recites a stack of hangers for framing material comprising certain elements. The preamble of claim 26 gives meaning to the claim as a whole, and the elements in particular, because it defines the device as a stack of hangers. As such it is patentably distinct from the disclosure of the ‘983 Patent.

The preamble of claim 26 also provides meaning to the elements recited within the claim. Each of the hangers has a pair of legs, each of which has a barbed member extending out from the associated leg. As described in the specification, the barbs are operable to be inserted into framing material; e.g., picture framing, artwork framing, etc. The recitation of the term “a stack of hangers for framing material” within the preamble necessitates that the elements be operable as a hanger. Hence, the aforesaid preamble terminology provides definition of the claimed invention (i.e., it structurally defines over the cited prior art) and therefore must be considered. See e.g., *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989)

In contrast, it is very clear from the '983 Patent that the clamping device cited by the Examiner is not a hanger, and cannot perform as a hanger. As stated above, the clamping device of the '983 patent is formed of a flexible material unsuitable for use as a hanger. This fact is particularly well illustrated by the above-cited disclosure that: "if the plate-like members are composed of material other than corrugated boards, into which the piercing pieces 15a and 15b cannot be readily caused to penetrate, such plate-like members should preferably be formed with suitable openings which permit reception of the piercing pieces 15a and 15b." (Col. 4, lines 35-41; emphasis added). A device that can only penetrate corrugated boards (e.g., corrugated cardboard) is not suitable as a hanger for framing materials. Consequently, the '983 Patent does not disclose a structure capable of performing as a hanger, cannot "meet" the claim, and does not anticipate the stack of hangers recited within claim 26.

The Examiner attempts to refute this point by stating that "[w]hile the hangers of Okamura et al. are made from a flexible material, the hangers are found to be strong enough to support structures having a light weight, such as paper posters or paperboards". (p. 4, 1/26/2006 Office Action) This argument fails for several reasons. First, if the clamping device was used on a paper poster or paperboard, the piercing pieces would extend through paper poster or paperboard. FIG. 6 clearly show the tips of the piercing pieces 15a and 15b extending through two layers of corrugated boards (which are typically much thicker than paper poster or paperboard). Clearly, a clamping device that that extends through "framing material" cannot be used as a hanger. Second, the geometry of the clamping device of the '938 Patent prevents it from being used as a hanger. FIG. 5 shows that the base portion 9 of the clamping device is flush mounted to the box lids, and has a thickness that is too thin to receive a hook, nail, or the like. In addition, the base portion has significant tapers on each end that would cause framing material to slide off of a hook or nail. Third, paper posters and paperboards are not considered to be part of a "frame", where a hanger such as the one presently claimed is deployed. Fourth, with respect to paperboard, the '938 Patent specifically states that when the "plate-like members" are comprised of material other than corrugated boards, the plate-like members preferably include openings to receive the piercing pieces. Framing materials do not include such openings. In summary, the Examiner's argument that the clamping device of the '938 Patent can be used as a hanger fails.

Claim 27, which depends from claim 26, further recites that each leg has a shoulder surface 158 spaced apart from the web, and that *the barbed member extends out from each respective leg adjacent the shoulder surface*. In the Office Actions of 5/3/2005 and 8/5/2005, the Examiner indicated that recesses 13a and 13b were considered to be the shoulders of claim 27. In the Office Action of 1/26/2006, the Examiner indicated that the reference to recesses 13a, and 13b was a typographical error, and that the shoulder should be labeled as “U”. Applicants thank the Examiner for her clarification.

The ‘983 Patent discloses that the piercing pieces 15a and 15b may each have a stepped recess “U”. (Col. 5, lines 32-47) FIG. 12 clearly shows that the recess U portion of the piercing pieces 15a, 15b extends out from the respective pivotal piece 10a, 10b, and the remainder of the piercing piece 15a, 15b extends out from the shoulder U. Claim 27, in contrast, recites that the barbed member extends out from each respective leg adjacent the shoulder surface. Claim 27 does not recite a barbed member extending out from a shoulder. This distinction is significant since it is the relative positioning of the shoulders and the barbed members within the present hangers that position the web away from the framing material. (See paragraph 0046). Consequently, the clamping device disclosed within the ‘938 Patent does not anticipate the stack of hangers recited within claim 27.

Claim 29, which depends from claim 26, recites a stack of hangers, wherein the tabs extending between adjacent hangers within the stack each have a feature that facilitates shearing of the tab. The ‘938 Patent does not disclose tabs or tabs having a feature that facilitates shearing of the tab. In fact, the Examiner’s rejections do not address this aspect of the present invention. Consequently, the clamping device disclosed within the ‘938 Patent does not anticipate the stack of hangers recited within claim 29.

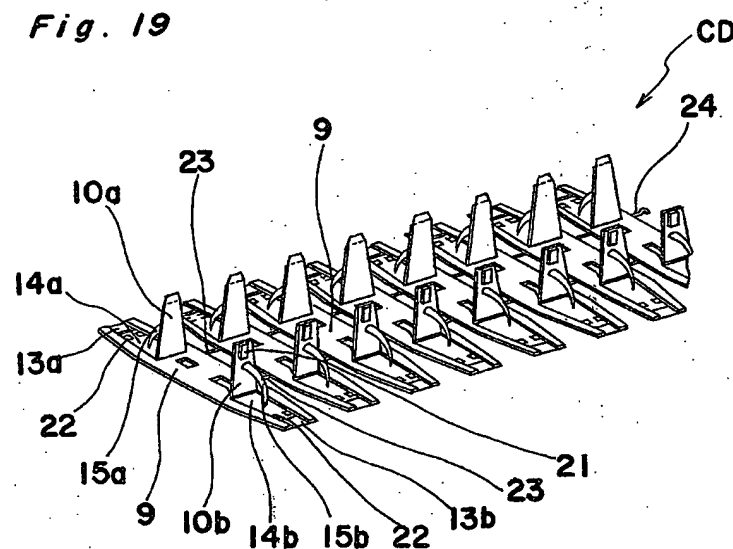
Claim 30, which depends from claim 26, recites a stack of hangers wherein the hangers are oriented within the stack such that legs of the hangers within the stack are substantially aligned along a single line. Paragraph 0038 of the present application provides that in an alternative embodiment, as shown in FIG. 3, the hangers within the stack can be oriented such that the legs of the hangers are substantially aligned along a single line. FIG. 3 clearly shows a stack of hangers disposed in an orientation where the legs are all in a single line. Tabs 160 extend between adjacent hangers. In fact, the Examiner’s rejections do not address this aspect of

the present invention. Consequently, the clamping device disclosed within the '938 Patent does not anticipate the stack of hangers recited within claim 30.

Regarding independent claim 37, applicants direct the Board to the remarks provided above relative to claim 26. For those reasons, applicants respectfully request the Board to reverse the present rejection. In addition, however, claim 37 recites that a stack of hangers for framing materials having one or more shearable tabs extending between, and attaching, adjacent ones of the plurality of hangers, wherein the tabs are coplanar with the web.

The Examiner states that “[f]igure 19 clearly illustrates that the tabs (23) are in the same plane as the webs (9) of each hanger of the stack of hangers.” (pg. 4, 1/26/2006 Office Action).

The '983 Patent describes that the clamping devices are formed by one-piece molding. (Col. 3, lines 27-37), and that wire-like connecting members 23 are suitably fixed to the under surfaces of the base portions 9 of the clamping devices. (Col. 6, lines 5-15) The described orientation between the clamping members and the wire-like connectors can be clearly seen from FIG. 19:



The coplanar orientation of the hanger webs and tabs within the claimed stack recited within claim 37 is significant for several reasons. First, the coplanar orientation of the hanger webs and tabs make it possible to stamp the stack out of material in sheet-form. As a result, the stacks can be easily manufactured in a cost-effective manner. The clamping device of the '938



Patent cannot be made in such a manner. Second, the coplanar orientation provides a geometry that facilitates use of the stack within a magazine. The wire-like connecting members of the '938 Patent require a magazine that allows for the wire-like members to be attached to the under surfaces of the base portions 9, and likely require the wire-like connecting members to always be uniformly positioned. Third, the coplanar orientation facilitates maintaining the stack in a defined geometry (e.g., adjacent hangers are not apt to laterally shift relative to one another) that is advantageous for use within a magazine and for automated application. In an automated apparatus, it is important that the hangers be uniformly positioned to ensure uniform application. Consequently, the clamping device disclosed within the '938 Patent does not anticipate the stack of hangers recited within claim 37.

For claim 38, applicant respectfully directs the Board to the above remarks under claims 37 and 27. For at least those reasons, applicants respectfully submit that the clamping device disclosed within the '938 Patent does not anticipate the stack of hangers recited within claim 38.

For claim 39, applicant respectfully directs the Board to the above remarks under claims 37 and 29. For at least those reasons, applicants respectfully submit that the clamping device disclosed within the '938 Patent does not anticipate the stack of hangers recited within claim 39.

For at least the reasons, applicant respectfully requests the rejection of claims 26-31 and 37-39 be reversed.

Claims 26-31 and 37-39 are Not Obvious Over U.S. Patent No. 4,728,237 (hereinafter the “ ‘237 Patent”) in view of the ‘983 Patent:

When an application is submitted to the Patent and Trademark Office, statute<sup>17</sup> and case law<sup>18</sup> dictates that the burden of proof is on the PTO to establish a prima facie case of obviousness.<sup>19</sup> Once the prima facie case has been established, then the burden of going forward with the evidence to rebut the prima facie case shifts to the applicant.<sup>20</sup> Only the burden of going forward with evidence to rebut shifts to the applicant, however. The burden of persuasion remains

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<sup>17</sup> 35 U.S.C. 132.

<sup>18</sup> See In re Warner, 154 USPQ 173, 178 (C.C.P.A. 1967); In re Oetiker, 24 USPQ 2d 1443, 1447 (Fed. Cir. 1992).

<sup>19</sup> In re Piasecki, 223 USPQ 785, 788 (Fed. Cir. 1984).

<sup>20</sup> In re Carleton, 202 U.S.P.Q. 165,168 (CCPA 1979).

with the PTO.<sup>21</sup> In this instance, a prima facie case would necessarily have to first establish that the combined teachings of the '237 Patent and the '983 Patent render the claimed subject matter obvious<sup>22</sup>, and second provide a suggestion or motivation within the cited references to combine the cited references to arrive at the claimed invention.<sup>23</sup> The suggestion or motivation to combine the references must not be a hindsight reconstruction of isolated disclosures within the prior art.<sup>24</sup> Indeed, the lack of an appropriate motivation or suggestion to combine gives rise to an inference that the combination is the product of hindsight.<sup>25</sup>

The Combined References Do Not Recite the Claimed Invention:

Regarding claims 29 and 39, the references do not individually or in combination disclose, teach or suggest a stack of hangers wherein the one or more tabs extending between adjacent hangers within the stack include a feature that facilitates the shearing of the tab. Applicants respectfully direct the Board to the remarks above under claims 29 and 39.

Regarding claim 30, the references do not individually or in combination disclose, teach or suggest a stack of hangers oriented such that the legs of the hangers within the stack are substantially aligned along a single line. Applicants respectfully direct the Board to the remarks above under claims 29 and 39.

Regarding claims 37-39, the references do not individually or in combination disclose, teach or suggest a stack of hangers having one or more shearable tabs extending between, and attaching, adjacent ones of the plurality of hangers, wherein the tabs are coplanar with the web. Applicants respectfully direct the Board to the remarks above under claim 37.

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<sup>21</sup> Ashland Oil v. Delta Resins and Refractories, Inc., 227 U.S.P.Q. 657, 659 (Cir. Fed. 1985). See also In re Fritch, 23 U.S.P.Q.2d 1780, 1783 (Cir. Fed. 1992): "In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. '[The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.' The patent applicant may then attack the Examiner's prima facie determination as improperly made out, or the applicant may present objective evidence tending to support a conclusion of nonobviousness.".

<sup>22</sup> In re Wood, 202 USPQ 171, 174 (C.C.P.A. 1979) citing In re Bozek, 163 USPQ 545, 549-550 (C.C.P.A. 1969).

<sup>23</sup> ACS Hosp. Systems, Inc. v. Montefiore Hosp., 221 USPQ 929, 933 (Fed. Cir. 1984), "Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can only be combined if there is some suggestion to do so."

<sup>24</sup> In re Fritch, 23 USPQ2d 1780 (Fed. Cir. 1992), "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention", quoting In re Fine, 5 USPQ2d 1596 , 1600 (Fed. Cir. 1988).

In summary, even if the cited references are combined as suggested by the Examiner, the aforesaid references do not disclose, teach or suggest the stack of hangers recited in claims 29, 30, and 37-39. Consequently, the stack of hangers recited within claims 29, 30, and 37-39 are not obvious in view of the combined references.

No Motivation or Suggestion to Combine the References:

The Examiner states that it would have been obvious to one having ordinary skill in the art at the time of the invention to modify the hanger of the '237 Patent to include the shearable tabs of the '938 Patent since the '938 Patent states that such a modification is known for the purpose of securing a series of elements to one another. Applicant respectfully submits that there is no suggestion or motivation to combine the references.

The Examiner relies upon two references from non-analogous fields of art. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of the applicant's endeavor or, if not, reasonably pertinent to the particular problem with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 1446 (Fed. Cir. 1992) In the present case, the '938 Patent discloses a clamping device for clamping plate-like members and the '237 Patent discloses a frame hanger. Consequently, the '938 Patent is not in the field of endeavor of either the applicant or that of the '237 Patent. According to the '938 Patent, the problem with which the inventor was concerned was the provision of a clamping device that is capable of readily effecting sealing and permitting opening of flap covers of packing cases made of plate-like members such as corrugated boards. (Col. 1, line 65 to Col. 2, line 2) As a solution to that problem, the '938 Patent discloses a clamping device. In some embodiments, a plurality of the molded clamping devices are connected to one another by a wire-like member. The present application, on the other hand, is directed toward providing an apparatus for installing hangers into framing material, which apparatus overcomes the shortcomings of using individual hangers. Consequently, the '938 Patent is not reasonably pertinent to the particular problem with which the present inventor was concerned. In summary, because the cited references are from non-analogous fields of art there is no suggestion or motivation to combine the references.

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<sup>25</sup> In re Rouffet, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998).

## VIII. CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the rejections of claim 26-31 and 37-39 are erroneous and reversal thereof is respectfully requested.

A check in the amount of \$250.00 for the appeal brief fee was enclosed with the appeal brief filed September 25, 2006. If there are any fees due in connection with the filing of this amended appeal brief, please charge them to our Deposit Account 50-3381. If a fee required for any extension of time under 37 C.F.R. §1.136 not accounted for above, such an extension is requested and the fee should be charged to the above Deposit Account.

Respectfully submitted,



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## CLAIMS APPENDIX

26. (Previously Presented) A stack of hangers for framing material, comprising:

a plurality of hangers, each having a web extending between a pair of legs, which legs extend outwardly from the web in a direction substantially perpendicular to the web, and a barbed member extending out from each leg; and

one or more shearable tabs extending between, and attaching, adjacent ones of the plurality of hangers.

27. (Previously Presented) The stack of hangers of claim 26, wherein each leg has a shoulder surface spaced apart from the web, and the barbed member extends out from each respective leg adjacent the shoulder surface.

28. (Original) The stack of hangers of claim 27, wherein an opening is disposed between adjacent hangers within the stack.

29. (Original) The stack of hangers of claim 26, wherein the tabs each have a feature that facilitates shearing of the tab.

30. (Original) The stack of hangers of claim 26, wherein the hangers are oriented within the stack such that legs of the hangers within the stack are substantially aligned along a single line.

31. (Original) The stack of hangers of claim 26, wherein the hangers are oriented such that the webs of adjacent hangers within the stack are substantially parallel and spaced apart from each other.

37. (Previously Presented) A stack of hangers for framing material, comprising:

a plurality of hangers, each having a web extending between a pair of legs, which legs extend outwardly from the web in a direction substantially perpendicular to the web, and a barbed member extending out from each leg; and

one or more shearable tabs extending between, and attaching, adjacent ones of the plurality of hangers, wherein the tabs are coplanar with the web.

38. (Previously Presented) The stack of hangers of claim 37, wherein each leg has a shoulder surface spaced apart from the web, and the barbed member extends out from each respective leg adjacent the shoulder surface.

39. (Previously Presented) The stack of hangers of claim 37, wherein the tabs each have a feature that facilitates shearing of the tab.

## **EVIDENCE APPENDIX**

None

**RELATED PROCEEDINGS APPENDIX**

None